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IN THE

Supreme Court of the United States

USX CORPORATION; BESSEMER AND LAKE ERIE RAILROAD COMPANY,
Petitioners,

v.

ADRIATIC INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CERTAIN DOMESTIC INSURER RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act ("FSIA") authorizes federal courts to exercise subject matter jurisdiction in actions against a "foreign state" and permits a "foreign state" to remove actions against it to federal court. 28 U.S.C. §§ 1330(a) and 1441(d). The FSIA defines "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Under § 1603(b), an entity may constitute "agency or instrumentality" in one of two entirely independent ways: *either* as an "organ" of a foreign state or a political subsdivision thereof, *or* if a majority of its shares or other ownership interest is owned by a foreign state or a political subsidivision thereof. 28 U.S.C. § 1603(b)(2). In the proceedings below, the United States Court of Appeals for the Third Circuit affirmed the District Court's holding that ICAROM, plc ("ICAROM") formerly known as the Insurance Company of Ireland ("ICI"), was an organ of the Republic of Ireland and as such, properly invoked federal court jurisdiction under the FSIA.

The two questions presented by the petition are:

1. Whether review of the Court of Appeals' decision is warranted where the Third Circuit articulated and applied the correct legal standard by determining subject matter jurisdiction as of the date the suit was filed and removed in 1995, and concluded, based on a thorough review of the record, that ICAROM has been an organ of the Irish government from 1985 to the present?

2. Whether review of the Court of Appeals' decision is warranted where its holding that ICAROM is an organ of the Irish government conflicts with no decision by this Court and further is consistent with decisions construing the organ prong of § 1603(b)(2) from its sister circuits?

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Respondent Tudor Insurance Company is owned by West ern World Holding Corporation. No publicly held company owns more than 10% of Tudor Insurance Company's stock.

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Respondent Allianz Underwriters Insurance Company is owned by Allianz Insurance Company, which is a wholly owned subsidiary of Allianz of America, Inc., a holding company that is 90% owned by Allianz Aktiengesellschaft of Munich, Germany. No publicly held company other than Allianz Aktiengesellschaft owns more than 10% of Allianz Underwriters Insurance Company's stock.

Respondent American Reinsurance Company is owned by the Munich Reinsurance Company. No publicly held company other than the Munich Reinsurance Company, a German company traded only on the German Stock Exchange, owns more than 10% of American Reinsurance Company's stock.

Respondent Government Employees Insurance Company ("GEICO") is owned by Berkshire Hathaway, Inc. No publicly held company other than that Berkshire Hathaway, Inc. owns more than 10% of Government Employees Insurance Company's tock.

. Respondent Sentry Insurance, a Mutual Company has no parent company. No publicly held company owns more than 10% of Sentry Insurance's stock.

Respondent Vanliner Insurance Company is owned by Unigroup, Inc. No publicly held company owns more than 10% of Vanliner Insurance Company's stock.

Respondent Fireman's Fund Insurance Company is owned by Allianz Insurance Company, which is owned by Allianz of America, Inc., which is owned by Allianz Aktiengesellschaft. No publicly held company other than Allianz Aktiengesellschaft owns more than 10% of Fireman's Fund Insurance Company's stock.

Respondent Zurich Insurance Company, as succeeded by Zurich American Insurance Company, is owned by Zurich Holding Company of America, Zurich Insurance Company, Zurich Financial Services, Zurich Allied, and Allied Zurich. No publicly held company owns more than 10% of Zurich Insurance Company's stock.

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BRIEF OF CERTAIN DOMESTIC INSURER RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Background

This case involves a claim by petitioners (appellants below), USX Corporation and its former subsidiary, Bessemer and Lake Erie Railroad Company ("B&LE") (collectively, "USX"), for indemnity under some 278 umbrella and excess liability insurance policies for hundreds of millions of dollars in damages paid by them as the

consequence of their participation in a massive antitrust conspiracy.

In 1982, B&LE pleaded *nolo contendre* to a criminal indictment for violation of the Sherman Act, 15 U.S.C. § 1, *et seq.* for conspiring to restrain trade in the transportation of iron ore on the Lower Lake Erie market. The district court convicted and sentenced B&LE, and the conviction was affirmed on appeal. *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593 (D.C. Cir. 1983). The victims of the conspiracy then filed numerous civil actions against B&LE. Following a trial, the jury found that B&LE had willfully and intentionally violated the federal and state antitrust laws. The district court entered final judgments against B&LE totaling $638.5 million, which B&LE ultimately satisfied by payment of over $592 million. *See In re Lower Lake Erie Iron Ore Antitrust Litig.*, 759 F. Supp. 219 (E.D. Pa. 1991), *aff'd in part, rev'd in part*, 998 F.2d 1144 (3d Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994). *See also* App. 9-12, 92-95.

B. The District Court Proceedings

On March 31, 1995, USX filed suit in Pennsylvania state court seeking coverage under respondents' insurance policies for the amounts paid by B&LE to satisfy the antitrust judgments. The complaint included ICAROM as a defendant because it had subscribed to at least six of the policies at issue. After ICAROM removed the case based on its status as a "foreign state" under the FSIA, USX voluntarily discontinued that suit. On May 18, 1995, it filed a second, substantially identical complaint in Pennsylvania state court that sought to exclude from the named defendants any "foreign state" under 28 U.S.C. § 1603. However, after ICAROM was joined as a third party defendant, it removed the case on June 7, 1995, again based on its status as a "foreign state" under the FSIA.

On March 29, 1996, the United States District Court for the Western District of Pennsylvania denied USX's motion to remand. (App. 54-89). The District Court held that ICAROM is a "foreign state" under § 1603 because it is majority owned by Sealuchais Arachais Teoranta ("SAT"), a holding company that is wholly owned by the Republic of Ireland. The District Court's decision was consistent with, and expressly relied on, then-controlling Third Circuit authority, *In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation*, 15 F.3d 1230, 1238 n.8 (3d Cir.), *cert. denied*, 513 U.S. 915 (1994), which recognized the right of the Insurance Company of Ireland ("ICI"), as ICAROM formerly was known, to invoke FSIA jurisdiction.

Four years later and after extensive merits discovery, the District Court granted the insurers' motions for summary judgment on the insurance coverage issues. *See USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593 (W.D. Pa. 2000) (App. 90-175). USX appealed the District Court's jurisdictional and merits rulings to the United States Court of Appeals for the Third Circuit. On May 1, 2001, the Court of Appeals remanded the case to the District Court solely for jurisdictional discovery and related motion practice. After extensive jurisdictional discovery, USX filed a Renewed Motion to Remand.

By its decision dated September 11, 2002, the District Court denied the motion to remand and held again that subject matter jurisdiction was proper, based on ICAROM's status as an "agency or instrumentality" of a foreign state under the FSIA. (App. 176-217). As the District Court found, by the 1980's ICI had become one of Ireland's largest insurance companies. By 1983, Allied Irish Banks ("AIB"), one of Ireland's largest banks, had acquired full control of ICI. AIB then discovered that ICI was in very poor financial condition. By 1985, ICI was insolvent, and AIB notified

the Irish government of ICI's condition. As the District Court noted:

> ICI's insolvency and potential collapse was viewed by the Irish government as a significant crisis due to the impact it could have on Ireland's banking and insurance industries, and in turn, the Irish national economy, and as a result the Irish government took immediate steps to acquire ownership of ICI and assist AIB in separating itself from its failing subsidiary.

(App. 182). In connection with the passage of emergency ICI-specific legislation in 1985 (the "1985 Act"), the Irish government acquired a 100% stake in ICI through the holding company, SAT, and thereby permitted AIB to divest itself of ICI. (App. 182-185). Five years later, in 1990, the Irish government sold the domestic portion of ICI's business, along with the ICI trade name, but retained the unprofitable operations, which could not be sold. At all times since the 1990 transaction, ICAROM, as the company then became known, has been operated by the Irish government solely as a runoff company. (App. 185-188). The District Court thus determined that "[t]he structure of Icarom's ownership following the 1990 transaction was and continues to be the same as ICI's was between March 15, 1985, and the 1990 transaction." (App. 188).

The District Court further found that, at all times following the 1985 emergency acquisition by the Republic of Ireland and the 1990 sale of the company's domestic operations, "the government of Ireland has exercised ongoing dominion and control over ICI and Icarom." (App. 188). As it observed, "[t]he ministers of the departments have exercised a controlling role in all major decisions affecting ICI/Icarom since it was placed in administration in 1985." (App. 189). The evidence clearly established that the Irish government controls the selection of key employees, has had complete control over ICAROM's financing and has borne significant

financial risk because of its ownership of ICAROM. (App. 189-193).

After noting that subject matter jurisdiction depended on ICAROM's status as a foreign state as of the time of removal in 1995 (App. 179, 193), the District Court concluded, based on its detailed factual findings, that ICAROM was an "agency or instrumentality" under § 1603(b) for the purpose of establishing subject matter jurisdiction under the FSIA on two independent grounds.

First, the District Court held that ICAROM is an "agency or instrumentality" of a foreign state because it is majority owned by the Republic of Ireland. The District Court found that ICAROM is wholly owned by SAT, which, in turn, is wholly owned by the Republic of Ireland. It then concluded, consistent with *Texas Eastern* and case law from the Fifth and Seventh Circuits, that such tiered ownership satisfied the majority ownership requirement in § 1603(b)(2). (App. 194-210).

Second, the District Court held that ICAROM is an "agency or instrumentality" because it was an organ of a foreign state at the time the case was removed in 1995. In the absence of Third Circuit authority construing organ under § 1603(b)(2), the District Court applied the multi-factor tests developed by the Fifth and Ninth Circuits and held that

> ICI/Icarom was acquired and has been administered solely for an important national purpose. Throughout the history of this litigation Icarom has been engaged in an activity designed to further that public interest. The Irish government has established a substantial level of oversight and control over all major decisionmaking affecting Icarom's ongoing financial affairs. The Irish government has exposed itself to substantial financial risk to assure that Icarom will be able to accomplish the national purpose to be served by its acquisition and administration. The Irish government has exercised sig-

> nificant oversight in the appointment of key personnel. Accordingly, the record supports Icarom's invocation of foreign state status under the organ prong of § 1603(b)(2).

(App. 217).

After entry of the District Court's decision, the Court held in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655 (2003), that tiered ownership does not satisfy the majority ownership requirement of § 1603(b)(2). The decision in *Dole* does not address the criteria necessary for an entity to establish itself as an organ of a foreign state under § 1603(b)(2).

C. The Court of Appeals' Decision

After *Dole v. Patrickson* was decided, the Court of Appeals received supplemental briefing and oral argument on the FSIA jurisdictional question. It then affirmed the District Court's jurisdictional and merits rulings. *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190 (3d Cir. 2003) (App. 1-53).

As a preliminary matter, the Court of Appeals noted that review of the jurisdictional issue was plenary. (App. 16). The Court also found significant, and quoted in its opinion, USX's concession that it "[did] not dispute the District Court's factual findings relating to ICI/ICAROM's alleged organ status," and that USX "contend[ed] only that the district court misapplied the relevant legal factors in considering those facts." (App. 16, 38).

In light of the holding in *Dole* that tiered ownership did not satisfy the majority ownership prong, the Court of Appeals stated that the District Court's exercise of subject matter jurisdiction on that basis could not be affirmed. (App. 18). However, the court proceeded to review the District Court's alternative basis for exercising subject matter jurisdiction based on ICAROM's status as an "organ" of a foreign state under § 1603(b).

The Court of Appeals reviewed the detailed record concerning ICI/ICAROM. Like the District Court, the Court of Appeals examined ICAROM's entire relationship with the Republic of Ireland, ranging from the Irish government's takeover of ICI in 1985; Ireland's ownership of ICI/ICAROM through the holding company created by the government, SAT; the 1990 sale of ICI's domestic operations and change of the name to ICAROM; and the Irish government's administration, supervision, control and financing of ICI/ICAROM from 1985 through the present. (App. 18-24).

After concluding that ICAROM did not waive the right to assert organ status under the FSIA (a holding that USX does not contest in its petition) (App. 24-31), the Court of Appeals discussed the legal standard under the organ prong that had been adopted by the Courts of Appeals for the Fifth and Ninth Circuits, as well as the history and purpose of the FSIA. The Third Circuit agreed with the Ninth Circuit that under the FSIA, "for an entity to be an organ of a foreign state it must engage in a public activity on behalf of the foreign government." (App. 35). To make that assessment, the Third Circuit adopted the same flexible, multi-factor approach applied by the Fifth and Ninth Circuits. It thus considered:

> (1) the circumstances surrounding the entity's creation; (2) the purpose of its activities; (3) the degree of supervision by the government; (4) the level of government financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; and (6) the entity's obligations and privileges under the foreign state's laws.

(App. 37) (footnote omitted). The Court of Appeals also considered, as part of its analysis, "the ownership structure" of the entity. (App. 37-38). In doing so, however, it explained that "[e]ven if we did not add 'ownership structure' as a seventh factor to consider in the organ analysis the allegation

likely would be relevant to the third factor, namely, the degree of supervision by the government." (App. 38 n.18). The court reasoned that under the organ prong of § 1603(b)(2), a foreign state might own, directly or indirectly, some, all or none of an entity because "section 1603(b)(2) does not require a foreign state to have any ownership interest in an entity for it to be its organ." (App. 38). The factor nevertheless might be significant, the Court of Appeals held, to the extent that "these different ownership structures might influence the degree to which an entity is performing a function 'on behalf of the foreign government.'" (App. 38) (footnote omitted).

Applying this standard, the Court of Appeals found subject matter jurisdiction proper under the FSIA because ICAROM "clearly" was an organ of Ireland at the time of suit. (App. 47). *See also* App. 36 n.16 ("we are holding that ICAROM was an organ when USX sued it and it removed the case and its status at that time is what matters."). With the exception of the fifth and sixth factors, all of the remaining factors supported ICAROM's organ status: "[T]he relevant factors suggest in this case that Ireland acquired ICAROM to fulfill a specific national purpose to avoid financial disruption, and that ICAROM therefore engages in a public activity on behalf of the Irish government." (App. 52). The Third Circuit specifically found that ICAROM, as a runoff company, has continued to engage in a public activity on behalf of Ireland because "it is carrying out the undertaking of the government when it intervened in the first instance so that a public financial crisis would be avoided." (App. 43).

Finally, the Court of Appeals summarily affirmed the District Court's ruling in the insurers' favor on the merits of USX's claim for insurance coverage for B&LE's antitrust violations. (App. 52-53).

SUMMARY OF THE ARGUMENT

The dispute here is one of subject matter jurisdiction under the FSIA in an action against ICAROM. In an effort to exaggerate the significance of this case in the scheme of FSIA jurisprudence, petitioners conjure two perceived inconsistencies between *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655 (2003) and the plainly correct decision below by the Court of Appeals for the Third Circuit. In fact, as evident from its thoughtful and well-reasoned opinion, the Third Circuit paid scrupulous attention to *Dole*—which did not address the organ issue at all—and its decision is fully consistent with the letter and spirit of *Dole*.

Petitioners first contend that the Court of Appeals violated *Dole*'s holding that subject matter jurisdiction must be determined as of the time the suit was filed and removed. That assertion is refuted by the Third Circuit's decision on its face. The Court of Appeals and the District Court both state expressly that they determined jurisdiction based on facts that existed *as of the time suit was filed and removed in 1995*, which is the standard articulated in *Dole*. Both courts concluded, based on the evidentiary record, that at all times from 1985 through the present, ICAROM has been an organ of the Irish government.

Second, contrary to USX's contention, the Third Circuit's holding that ICAROM is an organ of the Republic of Ireland and its opinion construing the organ prong of § 1603(b)(2) does not conflict either with *Dole* or with decisions from other circuits. This Court's decision in *Dole* did not address the standard for determining whether an entity is an organ of a foreign state under § 1603(b)(2). *Dole* was limited to the separate majority ownership prong of § 1603(b)(2). Further, the Third Circuit adopted and applied the same standard for determining whether an entity is an organ of a foreign state as that articulated by the Ninth Circuit: that is, whether the

entity is engaged in a public activity on behalf of a foreign government.

Because the Third Circuit's decision is fully consistent with *Dole* and FSIA organ decisions from other circuits, and further because petitioners' request for review by this Court is predicated on factual contentions that were rejected by both lower courts, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. CONSISTENT WITH *DOLE*, THE THIRD CIRCUIT PROPERLY DETERMINED SUBJECT MATTER JURISDICTION AS OF THE TIME THIS SUIT WAS FILED AND REMOVED IN 1995.

USX's contention, that the Court of Appeals flouted *Dole*'s holding that subject matter jurisdiction must be determined as of the time of the filing of suit, is utterly meritless. Both the Court of Appeals and the District Court properly determined subject matter jurisdiction *as of the time this suit was filed and removed in 1995*. Both courts found that as of 1995, ICAROM was engaged in a public activity on behalf of the Irish government and therefore was an organ of a foreign state under § 1603(b)(2).

There is no question that the courts below applied the correct standard for determining subject matter jurisdiction: that is, jurisdiction must exist as of the time of the filing and removal of the lawsuit. *See Dole*, 123 S. Ct. at 1663 ("instrumentality status is determined at the time of the filing of the complaint"). Here, the Third Circuit cited *Dole*, and then stated: "[W]e are holding that ICAROM was an organ *when USX sued it and it removed the case and its status at that time is what matters*." (App. 36 n.16) (emphasis added). Moreover, although its decision preceded *Dole*, the District Court

likewise articulated and applied the correct standard: "The central issue before the court is whether the ownership of Icarom *on the date of removal* entitled it to invoke FSIA jurisdiction. . . ." (App. 179) (emphasis added). *See also* App. 193 ("[T]he jurisdiction of this court is controlled by whether the ownership of Icarom *as it existed in 1995* satisfies the definition of a 'foreign state' . . . ") (emphasis added). Accordingly, USX's assertion that the Third Circuit "rejected this aspect of *Dole Food*, apparently because the 'organ' prong of § 1603(b)(2), as opposed to the majority ownership prong, was implicated" (Pet. at 13), is simply untrue.

In assessing ICAROM's status as an organ of the Irish government at the time the suit was filed and removed, the Third Circuit properly considered *all* the facts and circumstances bearing on ICAROM's relationship with the government. In addition to reviewing the events that precipitated Ireland's emergency takeover of ICI/ICAROM in 1985 (App. 19-21, 39-42), the court examined the government's decision in 1990 to sell ICI's Irish business and maintain the company in runoff, which ICAROM has done continuously from 1990 to the present. (App. 21-23, 42-43). The Third Circuit further examined the government's supervision of and control over ICAROM, and its financing of the company, from 1985 to the present. (App. 23-24, 43-44). Based on its review of the record, the Third Circuit found that, throughout this entire period, the Irish government's relationship with ICAROM essentially has been the same: ICAROM is wholly owned by Ireland and has been continuously engaged in public activities on behalf of the Irish government since the takeover in 1985. (App. 45-46, 52). The District Court reached the same conclusion, holding that ICAROM has been an organ of Ireland since 1985. *See* App. 217 ("ICI/Icarom was acquired and has been administered solely for an important national purpose. *Throughout the history of this litigation Icarom has been*

engaged in an activity designed to further that public interest.") (emphasis added).

USX's contention, that ICAROM no longer was an organ by 1995 because it had severed its ties with the Irish government, is based on factual assertions that were rejected by both lower courts and should not be credited by this Court in light of USX's concession in the Court of Appeals that it "[did] not dispute the District Court's factual findings relating to ICI/ICAROM's alleged organ status." (App. 16, 38). Thus, USX's assertions, that by 1995 ICAROM "was neither operated nor controlled by the Irish government" and that ICAROM "effectively had severed its relationship with the foreign state prior to the lawsuit" (Pet. at 13), cannot be credited in light of the contrary findings by the lower courts. *See* App. 21-23, 43-47, 188-193. As the District Court stated: "Through the Department of Enterprise, Trade and Employment and the Department of Finance, the government of Ireland has exercised ongoing dominion and control over ICI and Icarom." (App. 188). Further, both lower courts rejected USX's contention, made again in its petition, that ICAROM, as a company in runoff, was not conducting public activities on behalf of the Irish government in 1995. *See* Pet. at 6, 13-15. The Court of Appeals found expressly that in operating solely as a runoff company, ICAROM *"is carrying out the undertaking of the government when it intervened in the first instance so that a public financial crisis would be avoided."* (App. 43) (emphasis added). The District Court made the same finding. *See* App. 217. Thus, USX's characterization of ICAROM as having no ties to the Irish government by 1995 is flatly contradicted by the findings below and the record.

Review by this Court therefore is unwarranted where the Court of Appeals properly applied the *Dole* standard by determining ICAROM's status as an organ as of the time of suit. Moreover, the Third Circuit's decision refutes USX's

contention that the court improperly based its decision predominantly on so-called "stale" facts from ten years prior to the filing of suit in 1995. (Pet. at 5, 9-10). The Third Circuit, like the District Court, determined that ICAROM became an organ of Ireland in 1985 and that status had not changed by 1995. The fact that circumstances before the suit was filed would have warranted a finding that ICAROM was an organ of Ireland is hardly inconsistent with the Court of Appeals' holding that the facts in existence at the time suit was filed and removed in 1995 compel the same conclusion.

II. THE THIRD CIRCUIT'S HOLDING THAT ICAROM IS AN "ORGAN" OF IRELAND DOES NOT CONTRAVENE *DOLE*.

USX's assertion that the Third Circuit's holding that ICAROM is an organ of the Republic of Ireland under the FSIA contravenes the decision in *Dole* is wrong for the simple reason that *Dole* nowhere addresses the standard for determining whether an entity is an organ of a foreign state under § 1603(b)(2).

Under § 1603(b)(2), an entity can qualify as an "agency or instrumentality" of a foreign state in two entirely independent ways: *either* as an organ of a foreign state or a political subsdivision thereof, *or* if a majority of its shares or other ownership interest is owned by a foreign state or a political subsidivision thereof. *See* 28 U.S.C. § 1603(b)(2). The appellate courts consistently have held that the "organ" and "majority ownership" prongs of § 1603(b)(2) are separate and independent. *See EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) ("Even though a majority of Icarom's shares are not directly held by Ireland, it is still possible for it to be an 'organ' of a foreign state as defined by § 1603(b)(2)."); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846 (5th Cir.) ("because we conclude that Al Furat is an organ of a foreign state, we need *not* consider § 1603(b)(2)'s ownership require-

ments"), *cert. denied*, 531 U.S. 979 (2000); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir.) ("[T]he entity must *either* be an 'organ of a foreign state' *or* have a majority of shares owned by a 'foreign state or political subdivision thereof.'") (second emphasis added), *cert. denied*, 516 U.S. 869 (1995).

The first prong of § 1603(b)(2)—whether an entity is an organ of a foreign state—was not before the Court in *Dole*. The organ prong was not briefed by the parties[1] and the word "organ" appears only once in the entire opinion—in the quotation of the statutory language. *Dole*, 123 S. Ct. at 1659. Rather, the Court addressed only the majority ownership prong of § 1603(b)(2), and it held that indirect (tiered) ownership of an entity by a foreign government through a holding company does not constitute "majority ownership" by a foreign state or political subdivision under the statute:

> [The Dead Sea Companies] cannot come within the statutory language which grants status as an instrumentality of a foreign state to an entity a "majority of whose shares or other ownership is owned by a foreign state or political subdivision thereof." § 1603(b)(2). We hold that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.

123 S. Ct. at 1660. Because *Dole* did not address the organ test and because there is no other decision by this Court that has defined "organ" under the FSIA, the Third Circuit's

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[1] *See* Brief for Petitioners, 2002 WL 1987405, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655 (2003) (Nos. 01-593, 01-594); Brief of the Dole Petitioners, 2002 WL 2031217 (same); Brief of Respondents, 2002 WL 31261029 (same); Reply Brief for Petitioners, 2002 WL 31506978 (same); Reply Brief of the Dole Petitioners, 2002 WL 31527538 (same); Dole Petitioners' Motion for Leave to File Supplemental Briefing and Supplemental Brief, 2003 WL 328720 (same). *See also* Brief for the United States as *Amicus Curiae*, 2002 WL 31261045 (same).

decision construing the organ prong of § 1603(b)(2) does not contravene any decision by this Court.

Conceding as it must that *Dole* implicated only the majority ownership prong (*see* Pet. at 13), USX resorts to arguing that the Third Circuit's decision nevertheless runs afoul of *Dole* because the Court of Appeals took into account ICAROM's ownership by the Republic of Ireland in its analysis of whether ICAROM was engaged in a public activity on behalf of the government under the organ prong. More particularly, USX contends that because *Dole* concluded that a showing of government control was irrelevant to the determination of majority ownership status under the majority ownership prong, the converse should be true under the organ prong, that is, ownership should not be considered in determining whether a government controls an entity as part of the analysis under the organ prong. *See* Pet. at 16-17. This logic is flawed on several levels.

First, nothing in *Dole* suggests that courts must blind themselves to a foreign government's direct or indirect ownership of an entity in their analysis under the organ prong. To be sure, the Court in *Dole* noted that "[c]ontrol and ownership . . . are distinct concepts," and that "[m]ajority ownership by a foreign state, not control, is the benchmark of instrumentality status" under the majority ownership prong of § 1603(b)(2). *Dole*, 123 S. Ct. at 1661-62. However, nowhere did the Court suggest that control and ownership must *not* be considered in any fashion under the organ prong of § 1603(b)(2).[2] Thus, while the Third Circuit was cognizant

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[2] USX apparently does not dispute the relevance of governmental control over an entity as a factor under the organ prong. In fact, in the proceedings below, USX urged the lower courts to adopt the Ninth Circuit's standard for determining whether an entity is an organ under the FSIA, which standard specifically includes, as part of the analysis, consideration of the extent to which the government controls the entity. *See EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d

of this Court's distinction between ownership and control in *Dole* for purposes of the majority ownership prong, it explained that under the organ prong, ownership may bear on the extent to which an entity is controlled by a foreign government:

> The [*Dole*] Court rejected a control test under the majority ownership prong because the statutory language of the majority ownership prong of section 1603(b)(2) makes clear that ownership, not control, is required. *Id.* at 1661-62. On the other hand, the organ prong does not speak of ownership. *We find that, although Congress favored ownership over control in the majority ownership prong, its use of the word "organ" suggests an emphasis on control under the organ prong. Thus, although the 1985 Act in terms authorized the acquisition of SAT, not ICI, by that time SAT owned ICI and Dole does not prohibit us from examining the substance of the transaction, whereby full control of ICI effectively was transferred to the government, even if legal title to the shares of ICI was not.*

(App. 41-42) (emphasis added; footnote omitted). The Third Circuit found that in ICAROM's case, "[b]ecause an act of Parliament authorized the government's assumption of control over ICI and because of the extent of the government's involvement and authority in facilitating the transaction, this factor weighs in favor of a finding of organ status." (App. 41). As a result, its consideration of the Irish government's control and ownership of ICAROM as part of its analysis in no way ran afoul of *Dole*.

635, 640 (9th Cir.) (listing the entity's "independence from the government" as one factor of the multi-factor test) (quotations and citations omitted), *cert. denied*, 124 S. Ct. 533 (2003). *See also Kelly*, 213 F.3d at 846-47 (considering as one of five factors whether the foreign state actively supervises the entity). USX's petition confirms its continuing agreement with the organ standard articulated by the Fifth and Ninth Circuits. *See* Pet. at 17-18.

Second, under the organ standard articulated by the Ninth Circuit, and adopted by the Third Circuit here, a government's ownership of an entity also may be (but is not necessarily) relevant in determining whether the entity is engaged in public activities *on behalf of* a foreign government. *See* App. 35 ("We agree with the Court of Appeals for the Ninth Circuit that for an entity to be an organ of a foreign state it must engage in a public activity on behalf of the foreign government."); *EIE Guam,* 322 F.3d at 640 ("In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of a foreign government") (quoting *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir.) *aff'd on other grounds*, *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003)). As the Third Circuit explained, the ownership of an entity by a foreign government, whether direct or indirect, may be highly relevant in determining whether the entity is performing an activity "on behalf of" the government:

> Under the organ prong, as opposed to the majority ownership prong of section 1603(b)(2), a foreign state might own only 10% of an entity; it might own directly 50% of the entity; or it might own even 100% of a holding company that owns 100% of the entity. On the other hand it is possible that a foreign state might not own any portion of any entity that nevertheless is its organ as section 1603(b)(2) does not require a foreign state to have any ownership interest in an entity for it to be its organ. *Courts should consider how these different ownership structures might influence the degree to which an entity is performing a function "on behalf of the foreign government."*

(App. 38) (emphasis added; footnote omitted).

Accordingly, contrary to USX's contention, the Court of Appeals did not consider the government's ownership of ICAROM to be the determinative factor under the organ prong, and it did not improperly use ownership as a "proxy"

to establish organ status under § 1603(b)(2). Rather, the Third Circuit's consideration of the Irish government's ownership of ICAROM to inform its analysis of the extent to which the government controls ICAROM and the extent to which ICAROM is engaged in public activities *on behalf of* Ireland was entirely proper. There is simply no inconsistency with this Court's decision in *Dole*.

III. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

USX's contention, that the Third Circuit's holding that ICAROM is an organ under § 1603(b)(2) is inconsistent with organ decisions from the Ninth Circuit (Pet. at 17-20), likewise has no merit.

As noted above, the Third Circuit adopted the same standard for determining organ status that has been articulated by the Ninth Circuit—that is, whether the entity is engaged in a public activity on behalf of a foreign government. *Compare* App. 35 with *EIE Guam*, 322 F.3d at 640. The Fifth Circuit, the only other Court of Appeals to review the organ standard under the FSIA, applies a similar, although not identically worded, test. *See Kelly,* 213 F.3d at 846-47 (applying a flexible five factor review that includes consideration of whether the foreign state created the entity for a national purpose). Thus, there is no conflict or inconsistency among the circuits on the standard for determining whether an entity is an organ under § 1603(b)(2).

In addition to adopting the identical organ standard articulated by the Ninth Circuit, the Third Circuit also adopted the same multi-factor approaches applied by the Fifth and Ninth Circuits. *Compare* App. 37 *with EIE Guam*, 322 F.3d at 640 and *Kelly*, 213 F.3d at 846-47. The Third Circuit's addition of ownership structure to the list of factors does not render its decision inconsistent with—much less in

conflict with—the decisions from other circuits. The multi-factor inquiry that has been developed is applied flexibly by the courts, with no single factor being determinative in the analysis as to whether a particular entity is engaged in a public activity on behalf of a foreign government. *See Kelly*, 213 F.3d at 847 (although the factors "provide a helpful framework, we will *not* apply them mechanically or require that all five support an organ-determination"); *EIE Guam*, 322 F.3d at 640 ("An entity may be an organ of a foreign state even if it has some autonomy from the foreign government.") (citation omitted); *Gates*, 54 F.3d at 1461 (because "the [state] is not directly involved in the day-to-day activities of [the entity] does not mean that it is not exercising control over the entity"). Here too, the Third Circuit applied the multi-factor analysis flexibly, with no single factor (including ownership) being determinative. *See* App. 32-37.

In any event, and as noted by the Third Circuit, the articulation of an entity's ownership structure as a separate factor does not substantively alter the analysis because this factor overlaps with at least one of the other factors, degree of supervision of the entity by the government. *See* App. 38 n.18. *Accord EIE Guam*, 322 F.3d at 640 (listing third factor as independence from the government); *Kelly*, 213 F.3d at 846 (listing second factor as whether the foreign state actively supervises the entity). Moreover, the Ninth Circuit also considers ownership as a relevant factor under the organ prong, including in cases where the entity has not satisfied the majority ownership requirement under the majority ownership prong of § 1603(b)(2). *See, e.g., Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (holding that tiered subsidiary was an organ of Mexico and noting that factors supporting organ status included that it was "entirely owned by the Mexican Government"). Thus, the Third Circuit's consideration of a government's ownership of an entity in the determination of

whether it constitutes an organ is completely consistent with decisions from the other circuits.

USX's contention that the Third Circuit's decision is inconsistent with Ninth Circuit precedent is further undermined by the Ninth Circuit's opinion in *EOTT Energy Operating Ltd. Partnership v. Winterthur Swiss Insurance Co.*, 257 F.3d 992 (9th Cir. 2001), a case involving ICAROM that USX fails to cite to this Court. Although the factual record in *EOTT* was insufficient for the Ninth Circuit to rule on whether ICAROM was an organ of Ireland and caused the court to remand the case for further discovery, the Ninth Circuit indicated that ICAROM may well satisfy the organ prong of § 1603(b)(2). It stated that several factors supported ICAROM's organ status, including (1) that Ireland's purpose in acquiring ICAROM was not to make a profit but rather to serve the public interest; (2) ICAROM's status as an insurance company in run-off that made no profits; (3) that all of the shareholders of ICAROM's holding company, SAT, are government employees who serve at the Minister's behest and who hold their shares in trust for the Minister; and (4) that ICAROM's administrator reports to the Minister on ICAROM's affairs. *See EOTT*, 257 F.3d at 998-99. Thus, consistent with the Third Circuit's decision below (and contrary to USX's protestations here), the Ninth Circuit in *EOTT* recognized that ICAROM's operations as a company in run-off confirmed, rather than undermined, that it was continuing to serve the public interest and performing activities on behalf of the government of Ireland.

Lastly, USX's dire prediction that the Third Circuit's decision will expand the case load of the federal courts and unduly extend the FSIA's scope is wrong. As shown above, Congress expressly contemplated that "organs" of foreign states would qualify for FSIA protection. The Third Circuit's approach to determining an entity's organ status does not differ from the standard adopted by the other Courts of

Appeals. Like the Third Circuit, the Ninth Circuit consistently has stated that "the FSIA's legislative history suggests that Congress intended the terms 'organ' and 'agency and instrumentality' to be read broadly" by indicating that such entities "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." *EIE Guam*, 322 F.3d at 640 (quoting H.R. Rep. No. 94-1487, at 15-16 (1976) (*reprinted in* 1976 U.S.C.C.A.N. 6604, 6614)). *See also Gates*, 54 F.3d at 1460. The Third Circuit's decision has occasioned no change in the law and will have no impact on the case load of the federal courts.

As demonstrated above, USX's request for review of the Third Circuit's decision is not based on errors by the Court of Appeals on issues of law, as it is clear that the court applied the correct legal standard for determining jurisdiction under the FSIA and adopted the same organ test applied by its sister circuits. Rather, USX's true disagreement is with the factual findings by both lower courts concerning ICAROM and the Third Circuit's conclusion that ICAROM is engaged in public activities on behalf of the Irish government, thus qualifying it for organ status under § 1603(b)(2). While USX may disagree with the outcome in this case, review by this Court is unwarranted given the absence of legal errors, of any inconsistency with *Dole* or of any conflict among the circuits.

CONCLUSION

Based on the foregoing, the undersigned respondents respectfully request that USX's petition for writ of certiorari be denied.

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